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No. 95 - 1694

Supreme Court, U.S.

F I L E D

MAY 29 1996

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

*Petitioners,*

v.

JOHN DOE, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

Respondent Doe does not deny that there is split in the circuits on the issue presented in the University's Petition. As fully explained in the Petition (at 9-21), there is a pervasive split in the circuits: Some circuits follow the rule urged by the dissent below -- that Eleventh Amendment immunity turns on whether a State entity would be legally liable for the judgment entered in the case. Other circuits follow the approach adopted by the majority -- that immunity turns on a prediction of the likely financial impact that a judgment in the case may have on State resources.

Respondent instead devotes most of his opposition to arguing that the decision below does not bear upon the circuit split because, under the indemnity provision of the University-DOE contract, the federal government is required (subject to certain exceptions) to pay directly any money judgment entered against the University. Far from distinguishing away the circuit split, respondent's argument only demonstrates that this case presents the issue dividing the circuits in a particularly stark form.

Doe does not and cannot deny that the University will be legally obligated to satisfy any judgment entered in this case: The coercive process of the district court will run against the University -- and *only* against the University -- not the Department of Energy or any other federal agency. That undeniable fact squarely implicates the circuit split identified in the Petition because those circuits that base Eleventh Amendment immunity on legal liability (*i.e.*, the Fifth, Seventh and Tenth Circuits) would reach the result urged by the dissent below.

On the other hand, the fact stressed by Respondent -- that the indemnity provision in the University-DOE contract is, as Judge Canby noted, "relatively clear" (App. at 14a) -- presents the best case for the other side of the circuit split. For those circuits that base Eleventh Amendment immunity on the likely financial impact of each particular judgment (*i.e.*, the Third, Fourth and probably First Circuits), the relative certainty of the indemnity provision makes this a straightforward case for applying the theory of those circuits to deny the University Eleventh Amendment immunity

because it will *probably* not bear the ultimate cost of the judgment. (There is no *guarantee* that the University will not bear the cost of the judgment, but that is a general problem with the approach followed by those circuits.)

None of Doe's other arguments can obscure that this case provides a clean and straightforward set of facts to resolve the circuit split identified in the Petition.

#### A. This Case Presents The Circuit Split Identified In The Petition.

As Justice White noted in dissent from the denial of certiorari in *Paschal v. Didrickson*, 502 U.S. 1081, 1081 (1992), the split in the circuits encompasses the issue whether the Eleventh Amendment bars a suit even though "recovery is sought from funds . . . which come from the Federal Government." The precise mechanics of how the funds would "come from" the government is not relevant to the circuit split.<sup>1/</sup> Nevertheless, Respondent Doe hinges the bulk of his opposition to certiorari on the observation that the indemnity provision in the University-DOE contract requires the federal government (subject to certain exceptions) to pay directly final judgments entered against the

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<sup>1/</sup> Respondent argues that "the University is a mere facade for the DOE." Opp. at 10. That is nothing more than Doe's own biased characterization of the joint State-federal operations at LLNL. But in any event, it is hard to understand why Doe believes that such a slanted characterization has any relevance. First, Doe is suing only the University and its officers; if he believed his real dispute was with the DOE, he should not have dismissed his claims against all federal defendants in the District Court. Second, it is quite clear that a breach of contract action against the DOE would have to be brought exclusively in the Court of Claims. See 28 U.S.C. § 1491. Doe can escape that exclusive jurisdiction only because he is *not* suing the DOE. Finally, Doe's biased characterization does nothing to take this case out of the circuit split, because the same slanted label could be applied to any joint State-federal effort where the federal government shoulders the cost of the program.

University.<sup>2/</sup> From that correct observation, Doe argues (1) that the federal government will with certainty pay any judgment entered in this case and (2) that therefore the circuit split is not implicated. Both parts of this argument are wrong.

First, Respondent plainly errs in contending that the University's indemnity rights guarantee that the federal government will pay any judgment entered in the case. Even the DOE letter on which Respondent relies expressly states the DOE's position that it will bear the cost of any monetary judgment against the University "absent clear and convincing evidence of bad faith and willful misconduct of the Laboratory Director." Opp. App. at I - 3. The University could be expected to deny any allegations of bad faith and willful misconduct were DOE to resist payment on such grounds. But the important point is that there is always the risk of litigation over that point, and nothing in this case between the University and Doe can preclude the government from asserting a defense under the indemnity provision.

In addition to the bad faith exception, the contract also contains a number of other exceptions (*see* Pet. at 4), including a general exception dependent on "the availability of funds appropriated from time to time by Congress." App. at 37a. While Respondent Doe claims that "a few years of his salary as a physicist is hardly enough to strain the budget of the DOE," Opp. at 5, his opinion that the exception is unlikely to be invoked provides no certainty to the University.

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<sup>2/</sup> Part of Doe's argument focuses on semantics, specifically on the different shades of meaning between the words "indemnify" and "reimburse." *See* Opp. at 4 n.2. Even in terms of pure semantics, his point is weak: The very dictionary he quotes lists "reimburse" and "indemnify" as being within a class of synonyms for "pay." *Id.* But in any event, Doe's semantic point is irrelevant because the circuit split identified in the Petition does not turn on the mechanics of how the government would bear the cost of any judgment.

But even assuming that Doe is correct that the DOE is highly likely to pay any judgment entered against the University in this case, that only leads to the conclusion that this case presents the circuit split identified in the Petition in a particularly clean form.

The courts splitting from the Ninth Circuit do not base their decisions on an assessment of the probability that the State will bear the cost of the judgment, or on the mechanics of whether the federal government, if it is to bear the cost, will write the check to the plaintiff or to the State. Rather, the splitting circuits afford Eleventh Amendment immunity if the judgment -- the coercive process of the court -- will run against the State entity.

Thus, in *Cannon v. University of Health Sciences*, 710 F.2d 351, 357 (7th Cir. 1983), the court held that the universities in that case were entitled to Eleventh Amendment immunity because any judgment in the case would be "chargeable to university assets." See also *id.* ("If Cannon's suit would result in a damage award payable by the universities, it is barred by the Eleventh Amendment.") (emphasis added). Accordingly, the court rejected the argument that the universities were not entitled to Eleventh Amendment immunity because of "the possibility that a damage award would be met through insurance proceeds or from federal funds." *Id.* The precise mechanics of how an insurance company or the federal government might meet any damage award, as well as the exact probability that any damage award would be so met, were not relevant to the court's analysis.<sup>2/</sup> Here, as in *Cannon*,

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<sup>2/</sup> Respondent incorrectly argues that the *Cannon* court afforded Eleventh Amendment immunity "because 'it is "a virtual certainty [that any damage award will] be paid from state funds, and not from the pockets of the individual state officials who were defendants in the action.'" Opp. at 18 (quoting *Cannon*, 710 F.2d at 357 (quoting *Edelman v. Jordan*, 415 U.S. 651, 658 (1971))). The court quoted *Edelman* in rejecting the plaintiff's alternative argument that she could seek damages against the universities by naming individual defendants. Furthermore, the court interpreted the passage from *Edelman* as applying to the case because (continued...)

any judgment will clearly be "chargeable to university assets" as any district court monetary judgment will run only against the University. Accordingly, *Cannon* conflicts with the result below.

*Kroll v. Bd. of Trustees of Univ. of Illinois*, 934 F.2d 904 (7th Cir. 1991), took the analysis of *Cannon* further. There the plaintiff, like the Respondent here, argued that the Eleventh Amendment did not apply because his judgment would not have to be satisfied out of public funds. *Kroll* rejected that argument, stating that the flaw in the argument "is that it assumes that the eleventh amendment does not apply unless and until a private party seeks a money judgment payable from the state treasury." *Id.* at 908 (emphasis added). *Kroll* clarified that, even if a plaintiff is *not* seeking a money judgment payable from the state resources, the Eleventh Amendment demands dismissal of any suit against a State entity "in the absence of one of the two previously noted exceptions" (*id.*) to immunity: (1) express waiver by the State or (2) abrogation of immunity by Congress under the Fourteenth Amendment. See *id.* at 907 (listing exceptions).

Respondent attempts (Opp. at 19) to distinguish *Kroll* by referring to a footnote which states that "the determination [of whether a university is a State agency] requires a fairly fact-intensive analysis." *Id.* at 908 n.2. But, under the approach of the *Kroll* court, that analysis was conducted by looking to the university *as an institution* to determine whether, *as a whole*, it is part of the State. In this respect, the *Kroll* court followed precisely the analysis urged by the dissent below. It relied on its prior precedent for the holding that the University of Illinois *as an institution* was a State entity for purposes of the Eleventh Amendment. *Id.* at 908. Because the plaintiff had no argument that the ties between the State and the university had changed, *id.*

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<sup>2/</sup>(...continued)

"[r]ecovery is sought from the institutions, not the individuals." 710 F.2d at 357 (emphasis added). Here, as in *Cannon*, monetary recovery is being sought against the University, not against any individual defendant.

at 908 n.3, the court adhered to its prior precedent and refused to inquire into the financial impact of the particular judgment sought in that case. This is the position of Judge Canby, who argued that the immunity of University should be controlled by "established precedent" so long as the structural relationship between the State and the University has not changed.<sup>4/</sup> App. at 14a, 12a.

The other cases identified in the Petition follow an approach identical to that followed by the Seventh Circuit in *Cannon* and *Kroll*: The cases hold that the Eleventh Amendment immunity is triggered where the suit is against a State entity, regardless of how any judgment might be satisfied in that particular case. Thus, for example, in *Cronen v. Texas Dep't of Human Services*, 977 F.2d 934, 938 (5th Cir. 1992), the court rejected the plaintiff's argument that a suit against a State entity could go forward where the award sought in the case "would be paid entirely by the federal government." The court squarely held that "the source of the damages is irrelevant when the suit is against the state itself or a state agency." *Id.* Respondent's assertion that this statement is "erroneous dicta" (Opp. at 17) is unsupported and incorrect.<sup>5/</sup>

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<sup>4/</sup> Respondent recites facts that, he claims, suggest a "legal independence of the University from the State of California." Opp. at 7. These facts actually show only that the University is independent from the other branches of State government. Thus, the State legislature has less power over the University than "over other state agencies." Opp. at 6 (citation omitted). Also, the fact the University can hold property in its own name (Opp. at 6-7) is entirely consistent with that property being considered part of the State's property (Pet. at 3). But in any event, these facts are irrelevant as Respondent does not challenge that, in the absence of indemnification, the Ninth Circuit and all other courts agree that the University is part of the State. In fact, he concedes that the indemnification arrangement was "[c]rucial to the Ninth Circuit's decision." Opp. at 3.

<sup>5/</sup> Respondent suggests that the Fifth Circuit should have been decided on a narrower ground that the relief sought would still have a financial impact on the State "since all states fund administrative expenses [in the  
(continued...)]

Similarly, *Esparza v. Valdez*, 862 F.2d 788, 795 (10th Cir. 1988), reasoned "even if we could find little or no fiscal impact on the state from plaintiffs' suits, the financial impact on the state does not appear to be the predominant factor in Eleventh Amendment analysis." Respondent attempts to distinguish *Esparza* by quoting an earlier passage in the opinion stating that "[i]mmunity should not depend on which aspect of the state's tax base it seeks to utilize." *Id.* (quoted in Opp. at 16). But that quote represents only part of the court's reasoning. The court went further in next paragraph and held that the Eleventh Amendment applies even if there "no fiscal impact on the state." *Id.* Under the *Esparza* court's test, the Eleventh Amendment applies where "money damages are awarded against the state," *id.* (emphasis added), without inquiry into how such an award will actually be satisfied.

Finally, Respondent cannot distinguish *Mascheroni v. Board of Regents of the Univ. of Cal.*, 28 F.3d 1554 (10th Cir. 1994). As in *Kroll*, the *Mascheroni* court first determined that the University as an institution must be considered part of the State, and then held that, because it was part of the State, the University could not be sued in federal court unless one of only two exceptions applies: "express waiver of Eleventh Amendment immunity, or unequivocal Congressional abrogation of the States' Eleventh Amendment immunity." *Id.* at 1559-60 (citations omitted); compare *Kroll*, 934 F.2d at 907, 908 (same). Respondent correctly notes that the *Mascheroni* court did not investigate the contents of the Los Alamos contract and that it raised the Eleventh Amendment issue *sua sponte*. These observations only reinforce our arguments: The details of the

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<sup>2/</sup>(...continued)

food stamp program]. Opp. at 17. That, however, was *not* the court's holding. Moreover, the fact that the *Cronen* court did not investigate the precise mechanics of how the federal government shoulders the cost of the food stamp program only proves our point: In the circuits disagreeing with the Ninth Circuit, those mechanics are not relevant.

contract were not investigated because they were not *relevant* to the court's test for affording immunity. Furthermore, because courts sometimes have to adjudicate the jurisdictional issue of immunity *sua sponte*, the test for immunity must be relatively straightforward, without an unwieldy "financial impact" inquiry.

Even the cases on the other side of the circuit split do not turn on the mechanics of how the federal government would bear the cost of the relief entered in the case -- the major point advanced by Respondent. Thus, *Bennett v. White*, 865 F.2d 1395, 1408 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989), held that the Eleventh Amendment did not apply where the "relief would be at the expense of the federal government." *Robinson v. Block*, 869 F.2d 202, 214 n.11 (3d Cir. 1989), held that relief was available against a State program to the extent the program is "federally funded." *Foggs v. Block*, 722 F.2d 933, 941 n.6 (1st Cir. 1983), *rev'd on other grounds sub. nom.*, *Akins v. Parker*, 472 U.S. 115 (1985), held that no Eleventh Amendment bar existed where the cost of the State program "is borne by the federal government." And finally, *Brown v. Porcher*, 660 F.2d 1001, 1007 (4th Cir.), *cert. denied*, 459 U.S. 1150 (1981), took the most extreme position in holding that the Eleventh Amendment did not bar relief so long as the State's "general revenues" are protected from liability.

Whatever else might be said about these cases, it is clear that they turn on whether the federal government bears the cost of judgment directly or indirectly. The fact that Respondent stresses about this case -- the relatively straightforward and direct indemnity provision -- only means that this case presents an analytically clean version of the split.

#### **B. Respondent Cannot Reconcile The Decision Below With This Court's Decision In *Seminole Tribe*.**

Respondent relegates to a footnote his discussion of this Court's recent decision in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), but the case cannot be so easily dismissed.

*Seminole Tribe* reaffirmed this Court's long-held position that "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Id.* at 1124. Yet, in ruling that the University loses its immunity because the cost of any monetary award sought by the plaintiff is likely to be borne by the United States, the Ninth Circuit has clearly made "the relief sought by the plaintiff" relevant to the "question whether the suit is barred by the Eleventh Amendment."

*Seminole Tribe* also confirmed the proposition that the Eleventh Amendment bars both monetary damages *and* injunctive relief. *Id.* Here, the plaintiff is seeking both a monetary award of damages *and* an order of reinstatement. Even if the United States would pay any damage award entered against the University, an order of reinstatement will operate directly against the University. Under the Ninth Circuit decision, however, the University loses its protection against injunctive relief merely because it may not bear the brunt of the monetary award.

Nor can Respondent escape this problem by noting that, under § 1983, he "seek[s] prospective relief against [University officials] based on procedural violations of federal security clearance regulations."<sup>6</sup> *Opp.* at 24-25. To get *that* relief, Doe must prevail on the § 1983 claim, which would require (at a minimum) showing that (1) the University violated security regulations, (2) violations of federal security regulations are cognizable under § 1983 (a difficult task, given that § 1983 would

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<sup>6</sup> Respondent emphasizes his § 1983 claim and states that he "strongly disagree[s]" that this case can be characterized as a contract action. *Opp.* at 2. Doe's emphasis on the § 1983 claim is inexplicable. The § 1983 claim does nothing to change the case for certiorari here, as it is well-settled by numerous decisions that the Eleventh Amendment applies equally to federal question and diversity jurisdiction. See *Seminole Tribe*, 116 S.Ct. at 1127. Nonetheless, we note in passing that the only claim that Doe pursued on appeal against the University was his contract claim; his § 1983 claim was pursued on appeal only against Petitioner Nuckolls. See *App.* at 15a, 17a, 19a-20a.)

apply only if, *inter alia*, a federal law "creates obligations . . . intended to benefit the putative plaintiff," *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 108 (1989)); and (3) that an order of reinstatement is prospective relief. But under the Ninth Circuit's ruling, which stripped the University of its Eleventh Amendment immunity, Respondent can seek injunctive relief against the University even if he prevails *only* on his contract claim, notwithstanding that such relief would ordinarily be foreclosed by this Court's holding in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

In sum, the decision below, which hinges the University's Eleventh Amendment immunity on an evaluation of the financial impact of the judgment, implicates a deep circuit split and cannot be reconciled with this Court's decisions.

### CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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